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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

v.

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GANNETT COMPANY, INC., LOS ANGELES TIMES, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY AND THE WASHINGTON POST, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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THE INTEREST OF *AMICI CURIAE*

Amici curiae publish general circulation newspapers and magazines. They frequently report on major political and governmental events. One of the *amici*, The New York Times Company, also owns a book publishing company. To protect their news gathering and dissemination activities, *amici* rely on the freedoms of speech and press guaranteed by the First Amendment. To harvest the benefits from the original works of authorship which are published or broadcast by their organizations, *amici* rely on the protections provided by copyright law. Accordingly, *amici* are concerned that, in the instant case, this

Court establish the proper framework for reconciling the tension between the First Amendment and the copyright law authorized by Article I, Section 8, Clause 8 of the Constitution.

The Gannett Company, Inc. publishes 85 daily newspapers throughout the United States, including the national newspaper *USA Today*; it also owns television and radio stations, and operates Gannett News Service, a national wire service, and other news and information interests. The *Los Angeles Times*, a division of The Times Mirror Company, is a daily newspaper published in Los Angeles, California; it also syndicates newspaper features and is the joint owner of a news service. Newsweek, inc., a subsidiary of The Washington Post Company, publishes *Newsweek*, a weekly news magazine distributed in the United States and abroad. The New York Times Company and its subsidiaries publish *The New York Times*, 29 other newspapers and four magazines; it operates a news service and it owns television and radio stations as well as the book publishing company noted above. The Washington Post is a division of The Washington Post Company and publishes *The Washington Post*, a daily newspaper. It also syndicates columnists and contributes its newspaper material to a wire service and various electronic data base services.

INTRODUCTION: REPORTING THE NEWS

In this case, this Court is asked to resolve the tension between the First Amendment's protection of news reporting on political and governmental events of national importance and the protection afforded under the Copyright Act to nonfiction works written by former high public officials. Before advancing a framework for resolving the tension between the exercise of First Amendment rights and the protections of the copyright statute and applying that framework in this case, *amici* news organizations wish to stress several points about the gathering and dissemination of news. They do so in the hope that this Court's decision in the instant case will sustain

time honored practices of the media which help ensure a full and free flow of information to the public and which are essential to the functioning of our constitutional democracy.

First, news is as likely to be based on books and manuscripts as on speeches, press releases, hearings or other events. Indeed, the subject of *The Nation* article was clearly important news. The article reported President Ford's account of two of the most searing events of recent times: the resignation of President Nixon and his pardon by Mr. Ford. Moreover, at the time the article appeared in April, 1979, both Mr. Ford and Alexander Haig, who was also featured prominently in the article, were considered serious contenders for the 1980 Republican nomination. See Appendix A to Petition for Writ of *Certiorari* [hereinafter "App.A"] at A8. It has long been recognized that protection of free speech about, and free press reporting on, issues of governmental and political affairs is a "major purpose" of the First Amendment. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

Second, in their news columns, news organizations do not customarily add their own "independent commentary." See Petitioners' Brief [hereinafter "Pet.Br."] at 5. They do bring to bear their own news judgment in selecting and organizing material so as to highlight what they consider the most important or newsworthy information. For example, the American Society of Newspapers Editors' Code of Ethics, Canon IV, calls for a "clear distinction" between news reporting and the expression of opinion, commentary, and advocacy traditionally reserved for the editorial page. *See Code of Ethics in Journalism: Readings in the Mass Media*, 22 (A. Kirschner & L. Kirschner, eds. 1971). Petitioners' claim that *The Nation*'s failure to add independent commentary to the article makes the article a "non-productive use," Pet. Br.

at 5, 34-38, not only misconceives the historic separation between news columns and editorial pages but it also fails to recognize the selection and highlighting function that is a key aspect of news reporting.

Third, once news organizations receive newsworthy information that is authentic, they will generally publish or broadcast their independently selected and organized report of that information as soon as possible. The possibility that the information might be disseminated at some time in the future by someone else is a stimulus, not a bar, to immediate dissemination, given the importance in a democracy of the media's role in bringing important information about public affairs to the people as soon as possible.

Fourth, innumerable news stories are based on unsolicited documents and information. The test for dissemination in such circumstances is not the motive of the third party who provided the unsolicited document but whether the information contained in the unsolicited document is authentic and newsworthy.

In this case, *The Nation* determined that the unsolicited material it had received was clearly newsworthy. It worked intensively to select and highlight what, in its judgment, was the most newsworthy information from a lengthy manuscript. It presented the material in a straightforward way without adding editorial or other commentary on the manuscript. Satisfied with the authenticity of Mr. Ford's account, it published with the conviction that its article would contribute to public discussion of the issues reported. Joint Appendix at JA283-JA287. In sum, *The Nation*'s news reporting was generally consistent with news gathering and dissemination practices followed by the journalism profession.

SUMMARY OF ARGUMENT

In determining whether a newspaper or magazine article constitutes copyright infringement of another work, courts must ask first, as the Court of Appeals properly did, what material taken for the article was copyrightable. In answering that question, courts should apply important statutory doctrines that mediate between First Amendment rights and the interests protected by the Copyright Act: ideas, as opposed to the form of expressing those ideas, are not copyrightable; facts, as opposed to the form of expressing those facts, are not copyrightable; works of the United States are not copyrightable; and material not original to the author is not copyrightable. These statutory doctrines—especially the distinctions between ideas and expression and between facts and expression—should be applied so as to avoid questions of First Amendment violations.

The Court of Appeals properly applied those doctrines in concluding that only 300 words of President Ford's memoir as reported in *The Nation* article were copyrightable by petitioners. In particular, under the appropriate rules for a non-fiction work, *The Nation*'s summarizing and paraphrasing of certain ideas and facts described in President Ford's memoir did not constitute a copying of copyrightable material because there was not substantial similarity to the actual expression used by Mr. Ford and because the article did not mimic the structure of the memoir but was instead an original arrangement and selection of material which drew on widely disperate passages from a lengthy manuscript.

With respect to the approximately 300 copyrightable words that did appear in *The Nation* article, the Court of Appeals properly concluded that their reproduction by *The Nation* constituted a "fair use," in important part because the purpose of the article was unequivocally "news reporting" which was explicitly recognized by the Congress as a fair use under the Copyright Act. The use was also fair because the 300 words did not appear as a single passage in either the Ford memoir or in *The Nation* article. The 300 words represent the cumulative total of various passages, each consisting of no more than

a few sentences, found throughout the Ford memoir and throughout *The Nation* article. That the Ford memoir was unpublished at the time of publication of *The Nation* article does not justify the denial or narrowing of a fair use defense, because the author had consented to imminent publication of the memoir and hence cannot claim the violation of a viable privacy interest.

ARGUMENT

I. THE PROPER BALANCE BETWEEN THE FIRST AMENDMENT AND THE LAW OF COPYRIGHT ON WHAT IS COPYRIGHTABLE: STATUTORY DOCTRINES

In approaching this case, it is important to have clearly in view the statutory doctrines which define what is and what is not copyrightable and which thus seek to mediate between First Amendment and copyright interests.

A. The Need To Balance

Read literally, the First Amendment would invalidate the Copyright Act.[1] On the other hand, since the Copyright Clause of the Constitution, Art. I, Sec. 8, Cl. 8, vests in Congress the power to enact copyright laws, it might be argued that this creates a built-in immunity from the First Amendment for copyright. Both extreme positions are obviously untenable.[2] But if copyright is

[1] 17 U.S.C. § 101, *et seq.* The First Amendment requires that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[2] This court has not read the First Amendment literally or mechanistically, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 570 (1976), *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949), *Saia* v. *New York*, 334 U.S. 558 (1948), *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), and would not do so to abrogate copyright protection. Similarly, a "copyright exception" to the First Amendment is demonstrably specious. The First Amendment is an amendment, and hence modifies the previously adopted Constitution, including the Copyright Clause. Since the only powers of the Federal Government are those conferred by the Constitution, it is precisely those conferred powers which are limited by the Bill of Rights.

neither immune from nor invalidated by the First Amendment, then some constitutional accommodation must be found between these two competing interests.

B. The Competing Interests

This Court has on a number of occasions articulated the interest underlying copyright. For example, in *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), this Court stated:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'

Similarly, in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975), this Court observed:

> Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

In short, the purpose of copyright is to provide an incentive for author creativity, so that the public may reap the benefit of such creativity. See also, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S.Ct. 774, 783 (1984) [hereinafter "*Sony Corp.*"].

The primary purpose of the First Amendment's freedom of speech and press clause is to enlighten the nation's citizens so that they may enjoy individual freedom, develop to their fullest potential and practice the difficult art of self-government. This "enlightenment function"[3] was summed up in Justice Brandeis' classic statement: "[F]reedom to think as you will and to speak

[3] See *Nimmer on Freedom of Speech*, § 1.02 (1984).

as you think are means indispensable to the discovery and spread of political truth . . . ."[4] As Judge Learned Hand observed, "[the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be, folly; but we have staked upon it our all."[5] Although the enlightenment function is fulfilled by non-political speech,[6] there is no doubt that protection of "political speech" is a fundemental goal of the First Amendment.[7] Under any definition of "political speech," the subject matter of the disputed *Nation* article—a former President's account of his predecessor's resignation and pardon—surely constitutes speech about politics and governmental affairs of the highest order.

C. Striking The Appropriate Balance: Statutory Doctrines And First Amendment Rights

To avoid a clash between the constitutional rights protected by the First Amendment and the statutory interests protected by a copyright law expressly authorized in the Constitution, important doctrines have been developed to mediate between those potentially competing interests. Many of these doctrines have been codified in the Copyright Act of 1976, and must be applied to *The Nation* article to answer the threshold question in an infringement action: what copyrightable material contained in the Ford memoir was included in *The Nation* article.

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[4] *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[5] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943).

[6] E.g., *American Federation of Labor* v. *Swing*, 312 U.S. 321 (1941) (labor communications); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (religious speech); *Schad* v. *Mt. Ephraim*, 452 U.S. 61 (1981) (entertainment).

[7] *Brown* v. *Hartlage*, 456 U.S. 45, 52 (1982). See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838 (1978).

As will be discussed below, these statutory doctrines attempt to give ample breathing room to First Amendment rights because, if they did not, the copyright laws enacted by the Congress might themselves be unconstitutional violations of the First Amendment. Accordingly, these statutory doctrines should always be applied so as to avoid the constitutional question of whether the exercise of particular First Amendment rights must override the copyright statute.[8]

1. *The Idea-Expression Dichotomy.* It has long been recognized as a matter of copyright law that no protection may be claimed in an "idea" as distinguished from the "expression" of that idea.[9] This principle has now been codified in the current Copyright Act.[10]

A number of lower court decisions have held that the "idea-expression" dichotomy is also required by the First Amendment. By reason of the First Amendment, the copyright laws are precluded from granting a copyright in "ideas," but a copyright owner may prohibit the use by others of his "expression" without offending the First Amendment freedoms of speech and press.[11] This Court

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[8] *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591, 661-63 (1834) (protection given to copyright wholly statutory). See also *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-50 (1961); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (Federal statutes are to be construed so as to avoid serious doubts about their constitutionality).

[9] This Court has recognized that "protection is given only to the expression of the idea—not the idea itself", *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954), and that "copyright laws, of course, protect only the form of expression and not the ideas expressed." *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring).

[10] 17 U.S.C. § 102(b): "In no case does copyright protection for an original work of authorship extended to any idea . . . ."

[11] *Sid & Marty Krofft Television Prods.* v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Wainwright Sec. Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Walt Disney Prods.* v. *Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Quinto* v. *Legal Times*

has not yet directly held that the "idea-expression" dichotomy is required by the First Amendment,[12] and should do so in this case.

The rationale for such a distinction is straightforward. A limitation whereby authors may not prohibit others from copying their abstract ideas (as distinguished from their "expression") does not discourage creativity, or otherwise retard the "Progress of Science and useful Arts." Most, if not all, writers draw from the stock of ideas of their predecessors. Professor Chafee reminded us that "'[a] dwarf standing on the shoulders of a giant can see farther than the giant himself.'"[13] If writers and other creators could not build upon the ideas of their predecessors, not only would freedoms of speech and press be abridged, but the creative processes themselves—the copyright side of the balance—would also be severely circumscribed.

Similarly, the copyright restrictions on repeating or copying "expression" of ideas comports with the First Amendment's underlying rationale for freedom of speech. It is exposure to ideas, and generally not to their particular expression, that is vital if self-governing people

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of Washington, Inc., 506 F. Supp. 554 (D.D.C. 1981); *United States* v. *Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974).

[12] But in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577, n.13, (1977), which ruled on the impact of the First Amendment on the right of publicity rather than on copyright, this Court stated in a footnote: "We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.'" See also, *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1179-1180, n.2 (5th Cir. 1980) (Brown, J., concurring) (citing *Zacchini* and noting "the Supreme Court has given at least its most general approval to the 'idea-expression dichotomy' principle.").

[13] Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 511 (1945). The phrase can be traced to R. Burton, *Anatomy of Melancholy* (1618).

are to make informed decisions.[14] Accordingly, the "idea-expression" dichotomy generally represents an acceptable balance between copyright and First Amendment interests. In some degree, it encroaches upon the First Amendment in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the encouragement of creative works by means of copyright protection. In some degree, it encroaches upon the author's right to control his works in that it renders his "ideas" *per se* unprotectable, but this is justified by the greater public need for free access to ideas as part of the First Amendment's enlightenment function.

2. *The Exclusion of Copyright for Facts.* A second statutory copyright doctrine that mediates between First Amendment and copyright interests is that no copyright may be claimed in facts *per se*.[15] This result is also dictated by the limitation on Congressional copyright authority as contained in the Copyright Clause. That Clause empowers Congress to grant copyright only to "authors." One may discover a fact, but no one may claim to be the "author" of a fact.[16] Moreover, the effort expended in discovering a fact does not justify copyright protection in that fact.[17] The most significant compo-

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[14] It is not without significance that the objectives of freedom of speech and press are often said to be attained by "free trade in *ideas*." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

[15] *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981); *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Funkhouser* v. *Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953). See generally *Nimmer on Copyright*, § 2.11 (1984).

[16] "In no case does copyright protection for an original work of authorship extend to any . . . discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. Sec. 102(b).

[17] If a given fact were eligible for copyright by reason of the investigative or other efforts of its discoverer, there would be a

nents of copyright protection in a factual work relate to the literal form of expression—the actual sequences of particular words selected to describe given facts.[18] Thus, a substantial verbatim copying of such words will ordinarily constitute copyright infringement of a factual work.

The rationale for the "fact-expression" statutory doctrine is very similar to the rationale for the "idea-expression" dichotomy. The copyright interest is advanced by protecting the author's actual expression. The First Amendment interest in a full flow of information to the public is advanced by removing facts *per se* from the protection of the copyright law.[19]

Petitioners, citing the District Court's decision, ask this Court to hold that an author may copyright facts as long as he couples those facts with expression. Pet. Br. at 18-21. Petitioners' novel and misguided proposal would permit an author to acquire the exclusive right to recount a period of history by being the first to write about it—an intolerable and much criticized result.[20] There is simply no basis in copyright law for the rule

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wholly unacceptable inhibition on the marketplace of ideas. No one may claim a copyright monopoly on the facts of the Watergate incident or the experiences of the Iranian hostages, or any other fact no matter how newsworthy or historically significant. See *Miller* v. *Universal Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

[18] See cases collected in *Nimmer on Copyright*, § 2.11 [B] (1984).

[19] See *Time Inc.* v. *Firestone*, 424 U.S. 448, 472 (1976) (the truthful disclosure of facts constitutes such a vital First Amendment interest that even false statements of fact will sometimes also command First Amendment protection in order "to allow an adequate margin for error—protecting some misstatements so that the 'freedoms of expression . . . have the "breathing space" that they "need . . . to survive".' ").

[20] *See, e.g., Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 601 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Echevarria* v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935); *Nimmer on Copyright* § 2.11[E], at 2-169 (1984).

advanced by petitioners the facts *per se* are copyrightable when combined with expression. Such an erroneous proposition flies directly in the face of the fundamental principle that only that which is "original" with the author may be the subject of copyright.[21] Obviously, a fact does not originate with one who "discovers" the fact. The discoverer merely finds and records. He may not claim that the facts are "original" with him, although there may be originality and hence authorship in the manner of recounting, i.e., the "expression," of the facts.

Most of *The Nation* article insofar as it is derived from the Ford memoir consists of merely the reporting of facts, and not the copying of the precise words describing those facts as contained in the memoir. See pp. 15-20, *infra*. In order to maintain that this reporting of facts *per se* constitutes copyright infringement, petitioners are forced to rely upon the "totality" theory created by the District Court. Under this theory, the noncopyrightable facts contained in *The Nation* article were somehow transmuted into copyrightable works by the circumstance that they were collected together with Ford's reflections.[22] Even if Mr. Ford's reflections were themselves copyrightable (and they are not), a noncopyrightable fact cannot be made copyrightable simply because it is "collected together with" that which is copyrightable. If this were the law, then the Copyright Act would surely violate the First Amendment since it would mean that no one could repeat facts first discovered by another as long as the first person to publish such facts were careful to juxtapose them with that which is copyrightable.

Petitioners and the District Court commit further error in applying the "totality" theory by assuming that Mr. Ford's revelations as to his state of mind while involved in governmental affairs are themselves copyrightable. President Ford's state of mind while involved in governmental affairs is no less a "fact," in itself in-

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[21] 17 U.S.C. § 102(a). See *Nimmer on Copyright*, § 2.01 (1984).

[22] Appendix B to Petition For Writ of *Certiorari* at B9-B11.

capable of copyright protection, than is the fact that he granted Mr. Nixon a pardon. For example, in the Ford Manuscript, he states: "I was angry with myself for showing cowardice in not saying to the ultraconservatives, 'It's going to be Ford and Rockefeller . . . .'" Appendix E to Petition for Writ of *Certiorari*, at E5. *The Nation* article included the following passage: "and that he regretted his 'cowardice' in allowing Rockefeller to remove himself from Vice Presidential contention." *Id.* The only identical word is "cowardice." In this passage, there is obviously a copying of fact but not of expression.[23]

3. *The Exclusion of Copyright for Works of the United States Government.* A third statutory doctrine protecting First Amendment interests is found in 17 U.S.C. Sec. 105; copyright may not be claimed in works of the United States Government. Not every oral statement uttered by a government official during his term in office constitutes a work of the United States Government for this purpose. But it is beyond dispute that any statements which were reduced to writing *during* the official's term of office or performance of governmental duties and which relate to governmental affairs should be so classified. Even without this statutory provision, the same result would be required by the First Amendment. The enlightenment function served by the First Amendment is particularly relevant to works of the United States Government, while the competing copyright interest in

[23] It is irrelevant that Mr. Ford is both the author and the subject of the revelations. Suppose someone else in writing a biography of Mr. Ford made the same statement as to Mr. Ford's state of mind vis-a-vis Mr. Rockefeller. Copyright would attach to the first author's words describing the fact that Mr. Ford regretted his decision as to a vice-presidential running-mate, but, apart from his expression, the first author could surely not claim copyright in the fact *per se* of Mr. Ford's belief that he had made a mistake. The fact of Mr. Ford's state of mind does not suddenly become copyrightable simply because Mr. Ford rather than a third party is reporting that fact.

encouraging authorship has no application to such works.[24]

4. *The Exclusion of Copyright for Material Not Original to the Author.* A fourth statutory doctrine protecting First Amendment rights in the context of copyright is the rule that there is no protection for the use by an author of the verbatim conversations of others. This is so because of the requirement of the Copyright Act that an author's work be his own and not originate in others. 17 U.S.C. § 102(a). See also, U.S. Const., Art. I, § 8, Cl. 8 (reservation of copyright to "authors").

II. APPLICATION OF THE STATUTORY DOCTRINES: MOST OF THE NATION ARTICLE CONSISTED OF UNCOPYRIGHTABLE MATERIAL

The Court of Appeals properly stated and applied the statutory doctrines defining copyrightable material to the material from the Ford memoir used in *The Nation* article.

A. General

Once the erroneous "totality" theory advanced by petitioners is rejected, see p. 12, *supra*, then it is helpful in determining what was copyrightable by the petitioners to view *The Nation* article as having used four types of material from the Ford manuscript.

(1) *The Nation* used verbatim quotations from Mr. Ford about his own impressions, thoughts, judgments and actions. These verbatim quotations—which total about 300 words—are clearly expression and thus clearly copyrightable.

(2) *The Nation* used verbatim quotations from, or descriptions of, works of the United States such as the

[24] Works of the United States Government would be produced in any event due to governmental requirements. Copyright is not needed to encourage their production. Therefore, the First Amendment interests clearly outweigh any competing copyright interests as regards works of the United States Government, so that there may never be a copyright interest in such works.

memorandum of Henry S. Ruth (then a member of the Special Prosecutor's Office), statements of Mr. Ford transcribed by the Hungate Committee and the written memorandum which Mr. Ford prepared as Vice President and read to Alexander Haig. Although these works of the United States were included in the Ford manuscript, they are clearly not copyrightable by petitioners under 17 U.S.C. § 105, and their use by *The Nation* is non-infringing.

(3) *The Nation* used verbatim quotations from the Ford manuscript which are the exact words of others being reported by Mr. Ford. These quotations are not copyrightable by petitioners due to the exclusion from copyright of material not original to the author. See p. 15, *supra*. Petitioners now attempt to argue that Mr. Ford's quotation of statements made to him by others were not verbatim quotations, but his own reconstruction of such statements. Pet. Br. at 25. But the District Court "decline[d]" to find that such statements were in fact Ford reconstructions. App. B at B11.[25]

(4) *The Nation* paraphrased or summarized Mr. Ford's own words both as to what he said, thought or did and as to his perceptions of what others said, thought or did. As a general matter, these summaries are properly viewed as a legitimate description of "facts" or "ideas" and not as an impermissible copying of "expression." This conclusion is borne out by a fair reading of the comparison of the article and the Ford memoir submitted by respondents. See Joint Appendix at JA627-JA704.

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[25] Moreover, petitioners' argument is also answered by another principle of copyright law: one who presents material as factual cannot claim, as against one who relied upon such representation, that that which was copied constituted his own authorship rather than mere fact. Mr. Ford clearly was presenting what others said as factual. See *Marshall* v. *Yates*, 1983 Copyright Law Decisions (CCH) ¶ 25,594 (C.D. Cal. 1983); *Mosley* v. *Follet*, 209 U.S.P.Q. 1109 (S.D.N.Y. 1980); *Huie* v. *NBC*, 184 F. Supp. 198 (S.D.N.Y. 1960).

As facts or ideas, these passages are, of course, not copyrightable.

With respect to this fourth type of material drawn by *The Nation* from the Ford manuscript, the petitioners raise two related arguments about the application of the statutory definitional doctrines to the facts of this case: they claim that the Court of Appeals too narrowly limited the concept of expression and too broadly defined the concept of paraphrasing (as opposed to expression). Neither of these arguments—which raise mixed fact/law questions—is well-founded as *amici* will demonstrate immediately below.

B. Expression: Selection, Arrangement and Structure

Petitioners argue that the Court of Appeals erred, as a matter of law, because it did not consider an author's arrangement, selection and structure to be part of "expression" protected by copyright. Pet. Br. at 15. Petitioners are correct that selection, arrangement and structure may be considered part of expression,[26] but they are clearly wrong that this rule was ignored by the Court of Appeals or improperly applied in this case.

First, the Court of Appeals correctly stated, App. A at A16, that:

> The distinction between fact and expression is not always easy to describe. There are, however, several general principles according to which that boundary may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall *arrangement of facts*. The *structure* he chooses for the work as a whole is important. (Emphasis supplied.)[27]

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[26] *Nimmer on Copyright*, § 2.11[E] & § 13.03[A] (1984).

[27] Petitioners misleadingly focus on the Court of Appeals' statement that, in the context of news or history, expression must be limited to "its barest elements—the ordering and choice of the words themselves." Pet. Br. at 15. But this statement clearly has

Second, the Court of Appeals then properly held, App. A at A16, that

> In this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic. (Emphasis in original.)

That the Court of Appeals correctly applied the rule to the instant case is demonstrated by the comparison of the article and the manuscript. Joint Appendix at JA627-JA704. The pages of the Ford manuscript used by *The Nation* (indicated within parentheses after the Ford text) demonstrate a selection and arrangement of disparate information by *The Nation* in a manner that did not mimic the manuscript's structure.[28]

As the Second Circuit has stated in a leading case on news reporting and copyright, "the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source." *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (contrasting defendant's infringing use of plaintiff's copyrighted financial reports with the *Wall Street Journal*'s permissible use of those reports). Such news reporting of facts, not appropriation of expression, is precisely what occurred in this case.

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to be read as synonymous with the statement quoted above, or as dicta.

[28] It may be that an author's selection is infringed where the vast preponderance of his facts are appropriated. But here only tiny, disparate fractions of the Ford manuscript were used. Cf. *Eckes* v. *Card Prices Update*, 1984 Copyright Law Decisions (CCH) ¶ 25,672 (2d Cir. 1984) (infringement found where defendant took substantially all of the facts from plaintiff's compilation); *United States* v. *Hamilton*, 583 F.2d 448 (9th Cir. 1978) (infringement found where defendant cartographer took substantially all the facts from plaintiff's map).

C. Facts and Ideas: The Issue of Paraphrasing

Petitioners also maintain that the Court of Appeals improperly allowed virtually unlimited paraphrasing from the Ford manuscript. Pet. Br. at 21. But the Court of Appeals made a proper ruling on paraphrasing. To understand why, and to understand the status of paraphrasing in the law of copyright, one must distinguish between fictional works and factual works.

First, as to fictional works, Judge Learned Hand's famous abstractions test applies:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.[29]

The abstractions test does not, of course, dictate where in any given work the level of abstraction is such as to cross the line from expression to idea. Professor Chafee made some attempt to answer this most difficult question:

> No doubt, the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the 'pattern' of the work. . . the sequence of events and the development of the interplay of characters . . . .[30]

In a work of fiction, this means that at some point the plot line, for example, will be sufficiently developed and specific so that a copying will be regarded as the taking of protectable "expression," even though there has been

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[29] *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

[30] Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513 (1945).

no verbatim copying of the actual words employed by the first author. In that context, paraphrasing may constitute copyright infringement. That is what Learned Hand had in mind when he said that copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." [31] This is true because a highly developed plot line is itself a work of authorship protectable by copyright. Thus, even without copying the original words, to paraphrase a plot line can constitute a taking of "expression." [32]

But this test for fictional works is to be contrasted with the correct approach to a factual work where the so-called plot line, i.e., the sequence of events and interplay of characters, is based upon fact and not upon any author's fertile imagination. In those circumstances it is only the precise words which describe the "plot," and not the plot or sequence of events itself, which constitute the "expression" of a work of authorship. Thus, when, as here, an article describes a historical sequence of events, paraphrasing of factual information is both permissible, and, indeed, sometimes necessary. Extensive verbatim copying must occur to constitute copyright infringement, and no such copying is contained in *The Nation* article.

Of course, if the defendant extensively copied virtually the same words in a factual work as those employed by the plaintiff, but simply made certain minor changes, the plaintiff's work of factual authorship, i.e., his choice of words, has been substantially copied, and hence infringement should be found. But here (apart from the verbatim use of 300 of Mr. Ford's words discussed below under the fair use doctrine) there was a genuine restatement of facts by *The Nation* and not an almost verbatim copying of Mr. Ford's expression.[33]

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[31] *Nichols* v. *Universal Pictures Corp.*, *supra* 45 F.2d at 121.

[32] *See*, e.g., *Twentieth Century-Fox Film Corp.* v. *MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

[33] See *Landsberg* v. *Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984) (legitimate paraphrasing different for fictional and factual works). The cases cited by petitioners, all of which involve takings of expression, fail to undermine the Court of Appeals' conclusion that *The Nation's* paraphrasing of disparate facts did not constitute infringement of copyrightable material. See Pet. Br. 21-22. Those cases involved either the taking of virtually all of plaintiff's selection of facts, *W.H. Anderson Co.* v. *Baldwin Law Pub. Co.*, 27 F.2d 82, 88 (6th Cir. 1928), or the virtually verbatim taking of material, contiguous portions of plaintiff's pictorial and oral expression. *Flick-Reedy Corp.* v. *Hydro-Line Manufacturing Co.*, 351 F.2d 546, 548-49 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); *Wagner* v. *Meccano Ltd.*, 246 F. 603, 604 (6th Cir. 1917), *aff'g* 234 F. 912 (S.D. Ohio 1916). Petitioner's final case is inapposite since defendant's use was designed to appear to be a direct quote from plaintiff's copyrighted work. *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

III. THE USE OF THE COPYRIGHTABLE MATERIAL BY *THE NATION* WAS FAIR

After correctly holding that only 300 words of the approximately 2250 word *Nation* article constituted copyrightable material, the Court of Appeals further held that *The Nation*'s use of those 300 words from the 200,000 word Ford memoir was "fair" within the meaning of the statutory "fair use" doctrine which is now codified as Section 107 of the Copyright Act. 17 U.S.C. § 107. This ruling was correct.

The doctrine of fair use—like the statutory doctrines used to define what is and is not copyrightable—seeks to reconcile the tension between First Amendment and copyright interests. As Judge Kaufman stated, the doctrine ensures a "proper balance of the citizenry's need to be informed and the author's monopoly of his original writings . . . ." App. A at A24. And just as the statutory doctrines defining what is and what is not protected by copyright should be construed so as to avoid questions of First Amendment violations, so should the statutory fair use doctrine.[34]

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[34] See *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1181 (5th Cir. 1980) (Brown, J., concurring). Section 107 provides that "[i]n determining whether the use made of a work in any particular case is a fair use" courts should consider four enumerated criteria. 17 U.S.C. § 107(1)-(4). These

In light of standard news reporting practices, see pp. 2-4, *supra*, *amici* will briefly discuss the four express criteria to be considered in a fair use analysis and demonstrate that *The Nation*'s use of the Ford manuscript was fair.

A. The Purpose and the Character of the Use: News Reporting

The introductory phrase to Section 107 includes "news reporting" as a paradigmatic example of fair use: "the fair use of a copyrighted work, including such use . . . for . . . news reporting . . . is not an infringement of copyright." 17 U.S.C. § 107. News reporting is one of the "commonly recognized" situations involving fair use. *Sony Corp.*, *supra*, 104 S. Ct. at 807 (Blackmun, J., dissenting). Since virtually all news reporting is undertaken by profit-making enterprises, the Section 107(1) suggestion that a "commercial nature" tends to negate fair use clearly has no application to genuine news reporting.[35]

Petitioners incorrectly argue that, despite its paradigmatic status as news reporting, *The Nation* article was not a "productive use," and this militates against a finding of fair use. Pet. Br. 34-35. This Court has held that the fair use defense is not "rigidly circumscribed" by the productive use requirement.[36] In any event, *The Nation*'s use *was* a productive use. A productive use involves the contribution of original elements of authorship by the person asserting the fair use defense.[37] Almost all of *The Nation* article involves legitimate paraphrasing rather than verbatim copying. Such paraphrasing is itself a work of authorship, susceptible of copyright as a derivative work.[38] Moreover, the selection and arrangement of the matters taken from the 200,000 word Ford manuscript into the 2250 word *Nation* article also constitutes a work of authorship. As noted, p. 3, *supra*, news is often based on books or manuscripts, and an essential aspect of news reporting on such works is making an independent judgment about what is important and newsworthy and organizing the news report accordingly. All of this surely adds up to a "productive use," even if a "productive use" were regarded as a condition to a fair use claim.

B. The Nature of the Copyrighted Work: Fair Use Applies to About-to-be-Published Works

This Court has stated that "[c]opying a [copyrighted] news broadcast may have a stronger claim to fair use than copying a motion picture."[39] This is a particular application of the generally recognized principle that, in analyzing the nature of a copyrighted work under the second fair use factor, copying works of a factual *nature* should be given broader leeway under the fair use doctrine than copying works of a fictional nature.[40] 17 U.S.C. § 107(2). Here, especially, the nature of the copyrighted work used (the factual memoir of a former President on, *inter alia*, the resignation and pardon of his predecessor) strongly supports the purpose of the use (news reporting).

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four criteria are not meant to be exhaustive, however. S.Rep. No. 94-473, 94th Cong., 1st Sess. 62 (1975) (statute provides "very broad statutory explanation of what fair use is and some of the criteria applicable to it . . ."); *Nimmer on Copyright*, ¶ 13.05[A] at 13-65 (1984). Nor is the failure to satisfy any one of the statutory criteria determinative that the use in question is not "fair." Rather, a court should consider all of the relevant criteria when applying the "equitable rule of reason" analysis to a particular claim of infringement. *See Sony Corp.*, *supra*, 104 S.Ct. at 792.

[35] 17 U.S.C. § 107(1) (courts, in non-news reporting contexts, to evaluate "whether such use is of a commercial nature or is for nonprofit educational purposes").

[36] *Sony Corp.*, *supra*, 104 S. Ct. at 795 n.40.

[37] See *Nimmer on Copyright*, § 13.05[A][1] (1984).

[38] See *Nimmer on Copyright*, § 3.03 (1984).

[39] *Sony Corp.*, *supra*, 104 S. Ct. at 795 n.40 (1984).

[40] See *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

In arguing against the defense of fair use under the second fair use factor, petitioners and *amici* in support of petitioners have placed great reliance upon the fact that the Ford memoir was unpublished prior to *The Nation* publication. This reliance displays a misunderstanding of the applicable principles of copyright law. First, petitioners are simply wrong in their assertion that under common law copyright (which by definition [41] consisted of actions for infringement of unpublished works) the defense of fair use was never available. See Pet. Br. at 30. They do not cite a single case which holds that the defense of fair use at common law is unavailable as to the copying of an unpublished work in circumstances where, had the plaintiff's work been published, fair use would have been recognized.[42] On the other hand, there are a number of common law copyright cases where a fair use defense was recognized for use of unpublished works.[43]

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[41] See *Nimmer on Copyright*, § 2.02 (1984).

[42] Although petitioners cite no such case, *amicus* Association of American Publishers (AAP) does purport to cite three such cases: *Press Pub. Co.* v. *Monroe*, 73 Fed. 196 (2d Cir. 1896); *Golding* v. *RKO Radio Pictures, Inc.*, 193 P.2d 153, 163 (Cal. Dist. Ct. App. 1948) *aff'd*, 221 P.2d 95 (Cal. 1950); *Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal.2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc). See AAP Br. at 14. In fact, the *Press Pub.* case does not deal with fair use. The defendant published the plaintiff's entire work, so that fair use would not be appropriate regardless of whether plaintiff's work had been published prior thereto. The only significance of the fact that plaintiff's work was unpublished was that this was a necessary condition to the assertion of a claim for common law copyright. The *Golding* and *Stanley* cases were decided at a time when California operated under a statute which was more restrictive than common law or statutory copyright. They are thus not relevant to the present issue. For an explanation of this earlier statute, see *Weitzenkorn* v. *Lesser*, 40 Cal.2d 778, 256 P.2d 947 (1953).

[43] See, e.g., *Hemingway* v. *Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd*, 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968). The New York Court of Appeals in *Hemingway* found it

Second, petitioners rely upon a passage from the Senate Report on the current Copyright Act which states that the "applicability of the fair use doctrine to unpublished works is narrowly limited. . . ." [44] But this statement does not affect the valid fair use defense in this case. In the first place, the House Report never adopted this statement,[45] although it does repeat most of the other passages in the Senate Report.[46]

But even if the passage in the Senate Report were regarded as adopted by the House, it has no applicability to this case. One must look to the reason stated as to why the fair use doctrine is to be limited when applied to unpublished works. It is because "this is the result of a deliberate choice on the part of the copyright owner." [47]

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unnecessary to reach the defendant's fair use defense because of its finding of an implied license to the defendant. *Fendler* v. *Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930), relied upon by petitioners because of its statement (253 N.Y. at 291) that "perhaps any use that others made of it might be unfair" (Pet. Br. at 30, but with omission of the word "perhaps"), in fact invoked a fair use concept by reason of its conclusion that defendant may prevail because "where resemblance is close the material is trivial. . ." 253 N.Y. at 294. This, in effect, is an application of the third fair use factor, which turns on "the amount and substantiality of the portion used. . ." 17 U.S.C. § 107(3). Similarly, in *Malkin* v. *Dubinsky*, 203 N.Y.S.2d 501, 507 (Sup. Ct. 1960), in holding for the defendant, the court held that "plaintiff's claims involve, at best . . . some details which in the total context are trivial." Once again, the third fair use factor was, in effect, invoked.

[44] S.Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). See Pet. Br. at 30.

[45] The AAP Amicus Brief argues that the House in effect endorsed this position by stating its approval of prior 1967 House and 1975 Senate Reports. AAP Br. at 7. It is clear, however, that the passage supposedly stating such approval (H.R. Rep. No. 94-1476 at 67) in fact is addressed only to fair use in the classroom context.

[46] This failure to repeat the quoted passage implies a contrary intent on the part of the House. See *Sony Corp., supra*, 104 S. Ct. at 805 (Blackmun, J., dissenting).

[47] S. Rep. No. 94-473, *supra*, at 64.

The "deliberate choice" referred to is obviously not the choice that the defendant shall not publish the plaintiff's work. That is always the case when the defense of fair use is invoked. It is rather that the plaintiff has made the "deliberate choice" that the work is unpublished *and is to remain* unpublished.[48] In those circumstances, where the author intends to keep his work entirely private, as in the case of a diary or letters, the fair use doctrine may be narrowed.[49]

That, however, is not this case. The author, Gerald Ford, clearly did not intend to keep his manuscript confidential. He wished it to be read by the public. The fact that he did not wish *The Nation* to be the publisher of any of his material does not go to the issue of fair use; such opposition by the copyright holder to publication always arises in the context of an unlicensed defendant. Petitioners have made much of the fact that the Ford memoir was "soon to be published" as a reason why *The Nation* could not invoke the fair use defense. Pet. Br. at 38. In fact, as indicated above, this circumstance cuts in exactly the opposite direction. The very fact that the work was soon to be published indicates that the information contained therein was not regarded as material which the author wished to keep from the world, and hence, the defense of fair use is not barred or narrowed by the unpublished status of the work.

The reasons of "logic and policy" which petitioners offer to support the supposed fair use distinction between

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[48] It is this concept of intent to keep confidential indefinitely which is referred to in the passage from *Nimmer on Copyright* quoted by Petitioners: ". . . the scope of the fair use doctrine is considerably narrower with respect to unpublished works *which are held confidential by their copyright owners* . . . ." Pet. Br. at 31 (emphasis added), quoting from *Nimmer on Copyright*, § 13.05[A] at 13-73 (1984).

[49] The quotation from *Millar* v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.), see Amicus Brief of Volunteer Lawyers for the Arts, Inc. at 4, refers to this concept of total confidentiality and lack of intent to publish.

published and unpublished works are also easily rebutted. *Id.* at 31. Petitioners argue, first, that "an author who has published a work may be deemed to have consented to its 'fair use' by others." *Id.* This is manifestly a fiction. The applicability of the fair use defense is simply not triggered by the consent of the author.[50] The "second and more important reason" stated by petitioners to support their argument is that for an unauthorized person to be the first publisher of the author's expression infringes his right of first publication. Pet. Br. at 31. The fallacy of this argument is obvious. Unless one of the rights conferred by the Copyright Act has *prima facie* been violated (whether it be the right of first publication, the right of reproduction, etc.) there would be no occasion to raise the defense of fair use. When the defense of fair use is appropriate, it may be asserted despite the fact that there has been a literal violation of one of the exclusive rights conferred upon an author by Section 106 of the Copyright Act. Thus, Section 107, the fair use provision, begins: "Notwithstanding the provisions of section 106 . . . ." [51]

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[50] See *Nimmer on Copyright*, § 13.05 at p. 13-63 (1984).

[51] An analysis under the second fair use criterion should not consider the motives of the third person who removed the Ford manuscript from the Petitioner's possession, or the propriety of his actions. Whatever remedies might be available against such a person (e.g., for conversion, trespass to chattels, breach of a confidential relationship, or breach of the terms of a contract) can have no bearing upon the respondent's right to assert the defense of fair use. There is no evidence in the record that remotely suggests that respondents were engaged in, or aided in any manner, the taking of the manuscript from petitioners' possession. Review of an unsolicited document is a journalistic practice. See p. 3, *supra*; Epstein, "The American Press: Some Truths About Truths" in *Ethics and the Press* (J. Merrill & R. Barney, eds. 1975). To give any weight to the fact that the manuscript was given to *The Nation* unsolicited by a third party would undermine journalistic practice and thus the paradigmatic fair use of news reporting recognized by the Congress. 17 U.S.C. § 107. In addition, the mere fact that respondents had reason to know that petitioners would object to publication of *The Nation* article does not undermine their

C. The Amount and Substantiality of the Portion Used

Only "the portion used" of "the copyrighted work" is to be taken into account in determining amount and substantiality under the third fair use factor. 17 U.S.C. § 107(3). That portion used which is not copyrightable, and therefore not protected by the copyright in "the copyrighted work," is not to be taken into account in determining substantiality. Here, again, petitioners err in applying their "totality" theory. See pp. 12-14, *supra*. Thus, similarity of ideas and facts (as distinguished from their expression)—and similarity of works of the United States Government and similarity of verbatim statements of persons other than Mr. Ford—as between the article and the manuscript are not to be taken into account in determining such substantiality.

In assessing the instant case under this criterion, it will suffice to reiterate that the 300 copyrightable words quoted in *The Nation* article are a tiny fraction of the 200,000 word Ford manuscript and are not taken from any given integrated passage. They consist rather of the sum total of a line or several lines copied from numerous passages in the Ford memoir. Each passage standing by itself would clearly constitute fair use. Since they are not joined together in a single passage in *The Nation* article nor taken from a single passage in the Ford memoir and since none of the copied passages individually exceed the bounds of fair use, this Court should conclude that cumulatively the use remains "fair." [52]

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right to assert a fair use defense since, when one relies on the fair use defense, there is always reason to know the copyright owner may object to the use.

[52] This Court may take judicial notice that just this sort of quotation of passages without the consent of the copyright holder routinely occurs in book reviews. Similarly, an unauthorized biography of a famous person may well quote rather extensive passages from that person's antobiography without consent. A rule which precluded these widely-followed practices would run counter to the underlying purpose of copyright in that it would stultify other kinds of legitimate authorship.

D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth fair use factor, 17 U.S.C. § 107(4), often referred to as the most significant of the factors,[53] was incorrectly analyzed by the District Court precisely because of its erroneous "totality" theory. The District Court concluded: the "effect of *The Nation*'s extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright." App. B at B8. But the "Nixon pardon material" referred to by the District Court as contained in *The Nation* article for the most part consisted of noninfringing paraphrases of noncopyrightable facts and ideas, works of the United States Government, and statements made by persons other than Mr. Ford which are not protected by copyright.

Although the *Time* agreement was aborted after publication of *The Nation* article, it is important to recall that *Time* initially sought simply to move forward the date of its serialization. Petitioner Harper & Row refused, and it was this refusal which caused *Time* to cancel serialization. It is also reasonable to conclude that *Time*'s ultimate objection to serialization was to the premature disclosure of the *facts* relating to the Nixon pardon. If such facts had been disclosed by *The Nation* without also including any verbatim text at all from the Ford manuscript, there is no reason to conclude that *Time*'s decision to abort would have been otherwise. Thus the "use" of 300 words of protectable material from the Ford manuscript should not be viewed as having more than a *de minimus* impact upon the value of the copyrighted work. There is no more reason to conclude that the use of unprotected facts relating to the resignation and pardon should be the basis for liability by *The Nation* than there would be to hold *Newsweek* magazine liable to

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[53] *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968).

Time because an exclusive news story published by *Newsweek* has an adverse impact upon the potential market for or value of *Time*.

E. Fair Use Should Be Found To Avoid First Amendment Questions

The case for finding a fair use for the 300 copyrightable words from the Ford manuscript is compelling. But even if it were a close question, this Court should hold the use fair to avoid reaching a constitutional question. The 300 copyrightable words arguably present a situation where ideas and expression are inextricably intermingled and where, therefore, the First Amendment interest should be held to outweigh the copyright interest.[54]

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[54] An example of such a case is *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) in which the defendant reproduced frames from the Zapruder home movie films of the John Kennedy assassination without permission from the copyright owner. Although the court invoked the doctrine of fair use rather than the First Amendment in holding for defendant, the case has since been viewed as an example of a First Amendment privilege to copy expression where the idea cannot adequately be conveyed without reproducing the expression in which it was contained. See *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980); *Pacific and Southern Co.* v. *Duncan*, 572 F. Supp. 1186, 1193, n.5 (N.D. Ga. 1983). Other courts have suggested a possible receptivity to this doctrine in limited circumstances, although none has yet invoked it because the facts in each such case did not appear to involve the inextricable intermingling of idea and expression. See *Sid & Marty Krofft Television Prods., Inc.* v *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Roy Export Co. Establishment* v. *Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982); *Encyclopedia Britannica Educational Corp.* v. *Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982); *Pacific and Southern Co., Inc.* v. *Duncan*, 1982 Copyright Rep. (CCH) § 25,421 (N.D. Ga. 1982). Cf. *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1182 (5th Cir. 1980) (Brown, J., concurring).

The present case may well present an example of such inextricable intermingling. Since the book was in fact written by Mr. Ford, significant ideas conveyed were Mr. Ford's own views as to the incidents discussed. The "idea" of Mr. Ford's views as to his own conduct is in part wedded to what he has to say about such conduct, i.e., his "expression." This is not to say that in order to convey that kind of an idea it is necessary to quote verbatim the entire Ford text. It is to suggest that without some quotations of Mr. Ford's precise words, the "idea" of his mental processes in connection with a given incident cannot adequately be conveyed. Arguably, the verbatim use by *The Nation* of 300 of Mr. Ford's words is protected by the First Amendment when idea and expression are so intermingled.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that the judgment of the United States Court of Appeals for the Second Circuit be affirmed.

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